



July 5, 2019

David Fish, Executive Director
Office of Legal and Regulatory Services
NJ Department of Labor and Workforce Development
P.O. Box 110
13th Floor
Trenton, New Jersey 08625-0110

Re: Violations Regarding Wage, Benefits and Tax Laws

Dear Mr. Fish:

On May 6, 2019 the New Jersey Department of Labor (“NJDOL”) proposed regulations (the “Regulations”) to implement N.J.S.A. 34:1a-1.11 et seq., which empowers the Commissioner of the NJDOL under certain circumstances to issue a written determination directing any appropriate agency to suspend or revoke any one or more licenses that are held by an employer who has failed to maintain and report a record(s) regarding wages, benefits, and taxes that the employer is required to maintain or report under State wage, benefit, and tax laws, and in connection with that failure, has failed to pay wages, benefits, taxes or other contributions or assessments as required by the State wage, benefit and tax laws.

The NJDOL also solicited comments concerning the Regulations. In response to that invitation, the New Jersey Civil Justice Institute (“NJCJI”), together with the other undersigned organizations, submits these comments regarding the Regulations.

A. NJCJI

NJCJI is comprised of many of New Jersey’s leading employers, as well as small businesses, individuals, not-for-profit groups. Many of the State’s largest business associations and professional organizations, such as the New Jersey Business and Industry Association, the New Jersey Chamber of Commerce, and the Commerce and Industry Association of New Jersey, are also members.

Overview of NJCJI Comments:

Although N.J.S.A. 34:1a-1.11 et seq. was enacted almost ten years ago, no regulations were proposed until this year. Given the delay, we recognize that the objectives that prompted the legislation might have dimmed, creating a temptation to view the statute through lens of current policy priorities.

These comments identify two points where NJCJI believes that corrections are warranted, for the regulations to remain consistent with expectations and purpose of legislation as adopted, as indicated in both the text of the statute and the accompanying legislative statement.

B. Comments:

1. Definitions, “In connection with,” § 12:4-2.1

The Regulations define “in connection with” to mean either “related factually or causally, or discovered during the same investigation, a contemporaneous or a near contemporaneous investigation, regardless of whether related factually or causally.”

This definition would largely read the phrase “in connection with” out of the statute. By its terms, the definition would require no factual relationship; nor would it require that violations be discovered in same investigation, or even a contemporaneous investigation. Rather, a “a near contemporaneous” investigation would suffice.

The question is whether that elimination of a causal or factual connection is consistent with a fair interpretation of the phrase, and if not, what definition of the phrase would best align with the structure and legislative history of the statute.

Proposed Definition Inconsistent with Text of Statute

The phrase “in connection with” is presumed to have meaning, and therefore to require some sort of a relationship between the failure to record and report, and the failure to pay compensation. The statute thus requires more than a mere *coexistence* of a “violation of requirements to report and record wages” and a “failure to pay wages, benefits and taxes, the legislation.”

The structure of the sentence also indicates that the connection applies to the violations themselves, rather than to the timing of the discovery of those violations by the DOL. The statute requires “a failure to report and record ... as required by law in connection with the failure to *pay*,” not in connection with the *discovery* of the failure to pay.

In other contexts, New Jersey courts have not been receptive to similar attempts to read a causal connection out of the phrase. When New Jersey’s forfeiture statute provided for the forfeiture of a vehicle used “in connection with” the violation of drug laws, the court observed:

[O]ne does not properly, or at any event ordinarily, speak of two matters as being "connected" when they have nothing in common but a coexistence in point of time.¹

Concluding that the phrase requires a “tie of causality or dependency,” the court denied the seizure of the car which the defendant had been driving at the time of his arrest for possession of cocaine, as the car “did not, in the slightest degree, aid [the defendant] in committing the crime; the crime was not in any measure dependent on the car.”

¹ Ben Ali v. Towe, 30 N.J. Super. 19, at 24, 1954

The proposed definition is similarly inconsistent with the text of the statute, as it would authorize the DOL to exercise the enforcement powers under this statute due to the happenstance of the DOL's discovery of both recording and payment violations – with no causal connection.

Proposed Definition Inconsistent with Legislative History of Statute

Many statutes address the failure to follow wage and hour requirements in paying wages, benefits and taxes. This statute applies special penalties and grants special authority to the DOL where there has been both a failure to record and a failure to pay. The question is, what legislative purpose is served by such authority, when there is no concrete injury that results from the failure to properly report and record wages.

According to the legislative statement, the answer is straightforward. §34:1A-1.12 was enacted to target employers who “gain unfair competitive advantage” by employing workers “off the books” – “*choosing* to ignore record-keeping requirements and *evade* the payment of legally-required wages, benefits and taxes.”

The legislative statement therefore helps clarify the type of reporting failures which the legislation was designed to address. The proposed definition would encompass mere *errors* in wage and hour compliance – a failure to report and record *in the manner* required by law. But such a failure, together with the corresponding failure to properly pay appropriate compensation, simply tracks the same violation from start to finish.

While the consistent application of the same mistake in reporting and recording might produce a factual relationship between reporting and payment, it is not clear why such a scenario would merit the suspension or revocation of business licenses. And indeed, the legislative statement indicates that is not the scenario being addressed with this legislation.

When paying an employee off the books, on the other hand, the failure to report and record, and the failure to pay the wages, benefits and taxes have a much closer, causal connection. The failure to report and record wages as is required by wage and hour law is the *mechanism* by which the corresponding payment violations are accomplished and concealed.

In this context, the other aspects of the legislation similarly make much more sense. Paying off the books indicates a deliberate *choice* to violate the law, which explains the heightened penalties. As a *mechanism* of evasion, it also explains the particular choice of remedies, including auditing by the DOL

Requested Definition:

We therefore request that “in connection with” be defined to clarify the causal relationship between failure to report and record wages and benefits and the failure to pay wages, benefits and taxed, and align the operation of the statute with the concerns at issue when legislation was adopted:

“In connection with” means causally related, such that the employer has failed to maintain and report records regarding wages in order to evade requirements to pay wages, benefits, taxes or other contributions or assessments as required by law.

2. Definitions, “License,” § 12:4-2.1

NJCJI has a second concern regarding the expansion of the type of license that may be revoked under the statute.

The term “license” is already defined in the existing statute to include any authorization that is required by law and issued by any agency “for the purpose of operating a business in this State.” The definition lists six specific examples, and while not an exhaustive list, the examples are all consistent with the description in the statutory definition – authorization “for the purposes of *operating* a business.”

The proposed rulemaking would add a seventh category to the definition: professional licenses. This addition departs from the scope of the statutory definition, adding a uniquely dissimilar category that pertains not to authorization to *operate* a business, but to the authority to *work* as a licensed professional – including work for someone else’s business

The inclusion of professional licenses also would interfere with statutory authority of licensing boards under NJ Rev Stat § 45:1-21 (2013). The proposed language claims for the Department of Labor the authority to “direct” any appropriate agency to suspend or revoke a professional license. The authority to make such determinations has been statutorily delegated to the licensing boards themselves.

Requested Definition:

We therefore request that the statutory definition for “license” be applied in the regulations, and the “professional license” category be deleted.

Very truly yours,

New Jersey Civil Justice Institute
New Jersey Apartment Association
New Jersey Bankers Association
Bus Association of New Jersey
New Jersey Business & Industry Association
New Jersey Chamber of Commerce
Chamber of Commerce Southern New Jersey
Chemistry Council of New Jersey
New Jersey Concrete & Aggregate Association
New Jersey Credit Union League
New Jersey Dental Association
Fuel Merchants Association of New Jersey
New Jersey Gasoline, C-Store, Automotive Association

Home Care & Hospice Association of New Jersey
New Jersey Independent Electrical Contractors Association
Insurance Council of New Jersey
Mechanical Contractors of New Jersey
New Jersey Motor Truck Association
NFIB/New Jersey
Professional Insurance Agents of New Jersey
New Jersey Restaurant & Hospitality Association
New Jersey Retail Merchants Association
New Jersey Society of CPAs
New Jersey Staffing Alliance